

BALL JANIK LLP

A T T O R N E Y S

**1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005**

www.balljanik.com

TELEPHONE 202-638-3307

FACSIMILE 202-783-6947

KARL MORELL

kmorell@dc.bjllp.com

April 14, 2010

E-FILE

**Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-001**

226808

**Re: STB Docket No. AB-6 (Sub-No. 470X), BNSF Railway Company –
Discontinuance Of Trackage Rights Exemption – In Peoria and
Tazewell Counties, Illinois**

Dear Ms. Brown:

**Attached for filing is the Response of BNSF Railway Company to the
Reply filed by Toledo, Peoria & Western Railroad Company.**

If you have any questions, please call me.

Sincerely,



Karl Morell

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-6 (SUB-NO. 470X)

**BNSF RAILWAY COMPANY
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN PEORIA AND TAZEWELL COUNTIES, ILLINOIS**

RESPONSE

**Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive AOB-3
Fort Worth, Texas 76131**

**Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307**

**Attorneys for:
BNSF Railway Company**

Dated: April 14, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-6 (SUB-NO. 470X)

**BNSF RAILWAY COMPANY
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --
IN PEORIA AND TAZEWELL COUNTIES, ILLINOIS**

RESPONSE

BNSF Railway Company ("BNSF") hereby responds to the Reply in Opposition to the BNSF Petition For Exemption ("Reply") filed by Toledo, Peoria & Western Railroad Company ("TP&W") with the Surface Transportation Board ("Board").

BACKGROUND

On February 16, 2010, BNSF filed with the Board a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 (the "Petition") to discontinue its trackage rights over the rail line located between Bridge Junction in Peoria, IL, and P&PU Junction in East Peoria, IL (the "Line"). The Line is owned by the Peoria and Pekin Union Railway Company ("P&PU") and leased to the Tazewell & Peoria Railroad, Inc. ("TPR").

As pointed out in the Petition, one of BNSF's predecessors, the Burlington Northern ("BN"), acquired the overhead trackage rights in 1973, to enable BNSF to interchange traffic with TP&W in East Peoria via the P&PU bridge over the Illinois River after the parallel bridge owned by TP&W was damaged. *See Finance Docket No. 27317, Burlington Northern, Inc. – Trackage Rights – Peoria & Pekin Union Railway Company Between Peoria and East Peoria,*

Illinois (not printed), served June 4, 1973. BN discontinued the direct interchange with TP&W in 1982, and thereafter the interchange was made via P&PU, and now TPR.

REQUESTED LEAVE TO FILE RESPONSE TO REPLY

BNSF hereby seeks leave to file rebuttal evidence and argument in response to the Reply. While a reply to a reply is not permitted (49 C.F.R. § 1104.13(c)), the Board can waive the rule pursuant to 49 C.F.R. § 1110.9. BNSF could not possibly have anticipated the filing of such misleading facts as those contained in the Reply which requires rebuttal. Therefore, in the interest of having a more complete record, BNSF urges the Board to accept for filing this Response. *See Chicago Rail Link, L.L.C. – Lease & Oper. – Union Pacific RR Co.*, 2 S.T.B. 534, 535 (1997); *Delaware & H. Ry. Co. v. Consolidated Rail Corp.*, 9 I.C.C.2d 989, 990 (1993).

RESPONSE

The Reply contains inaccurate and misleading information. For example, TP&W falsely claims that in 1982 BN insisted on handling the traffic via P&PU. Reply at 4. As TP&W well knows, the traffic started moving via P&PU after P&PU cancelled the trackage rights agreement between BN and P&PU ("BN Agreement"). TP&W was notified of the cancellation in 1982¹ and TP&W was again informed of the cancellation recently on more than one occasion. Section 9 of the BN Agreement permits P&PU to cancel the BN Agreement on six months' written notice. Section 9, in turn, obligates BN to file for authority to discontinue its trackage rights upon receipt of the cancellation notice.²

¹ By wire dated May 26, 1982, BN notified TP&W of the cancellation of the BN Agreement effective as of June 1, 1982. Indeed, by letter dated May 26, 1982, TP&W notified P&PU that TP&W and BN had agreed to the P&PU intermediate switch.

² It is unclear why BN failed to file for discontinuance authority in 1982. BNSF became aware of this contractual obligation when TP&W contacted BNSF requesting that BNSF recommence its direct interchange with TP&W pursuant to the cancelled BN Agreement.

TP&W next argues that it has been paying an intermediate switch charge plus the trackage rights fees.³ TP&W cannot possibly be paying a trackage rights fee pursuant to the BN Agreement since that Agreement was cancelled 28 years ago and no operations under that Agreement have taken place since the cancellation. Moreover, it is BNSF and not TP&W that pays the intermediate switch charge for the traffic that is delivered by TPR from TP&W to BNSF.

TP&W goes on to make the unsupported allegation that the TPR intermediate switch adds one to two more days of transit time than if BNSF were to interchange directly with TP&W. Since BNSF has not interchanged directly with TP&W in East Peoria for 28 years one wonders how TP&W arrived at that conclusion. Operations and traffic conditions have changed dramatically in the Peoria area since 1982. BNSF would have to make up a special train for the TP&W traffic in BNSF's Peoria Yard for handling to TP&W's Yard in East Peoria. As a locally based carrier, TPR surely can handle the switch move to the TP&W yard more frequently and timely than BNSF. Moreover, BNSF has informed TP&W that there are operational issues which may make the direct interchange impracticable and uneconomical.

TP&W also makes the statement that, if the requested discontinuance is allowed, TPR "will be required to be added as a third carrier in the route." TPR and its predecessor, P&PU, have been the third carrier in the route for 28 years. Granting the Petition will have no impact on the routing of traffic in the Peoria area.

TP&W finally comes to the crux of the matter. It is attempting to interject BNSF in a dispute between TP&W and TPR over the level of TPR's intermediate switch charge. TP&W complains about TPR's \$106 per car intermediate switch charge and contends that the charge is

³ TP&W was contractually obliged to pay all trackage rights fees under the BN Agreement.

significantly more than the trackage rights fee TP&W would pay under the BN Agreement. What TP&W conveniently ignores is that the BN Agreement was cancelled and there is no applicable trackage rights fee. Consequently, if BNSF were to resume operations under the BN Agreement, TPR would undoubtedly initiate a trackage rights compensation proceeding against BNSF. There is no way for either TP&W or BNSF to know whether the trackage rights fees ultimately established by the Board would be more or less than TPR's intermediate switch charge.

TP&W's contention that denial of the Petition would improve car utilization and reduce intermediate switch charges for the benefit of shippers is both disingenuous and unsupportable. TP&W is not seeking to benefit shippers but to enrich itself by redistributing between TP&W and TPR a portion of the overall rates paid by shippers. Shippers are not paying more for rail service, it is only TP&W that is receiving less in compensation. In any event, it is unlikely that a direct interchange would produce the claimed benefits. It is further unlikely that BNSF would be able to provide more frequent or timely service than that provided by TPR. It is also unlikely that the direct BNSF service would lower the cost to TP&W. TPR would be entitled to collect its trackage rights fees (which would need to be established) and BNSF would need to be compensated for its additional costs of switching the TP&W cars between the BNSF and TP&W yards.

The futility of TP&W's requested relief – denial of the Petition – is best demonstrated by what TP&W has failed to point out.

First, TP&W mentions the fact that TP&W also received trackage rights over the P&PU line. See Finance Docket No. 26476, *Toledo, Peoria & Western Railway Co. – Trackage Rights – Peoria & Pekin Union Railway Co.* (not printed), served June 25, 1971. Those trackage rights

permit TP&W to make a direct interchange with BNSF in BNSF's yard in Peoria. To the best of BNSF's knowledge, those trackage rights are still in effect. TP&W has failed to explain to BNSF or the Board why TP&W does not use its own trackage rights to circumvent TPR's intermediate switch charge.

Second, pursuant to a settlement agreement in the BN-ATSF merger proceeding, BN granted TP&W trackage rights over BN's rail line between Galesburg and Peoria, IL. TP&W was also granted haulage rights between Galesburg and Peoria. *See Burlington Northern Et Al. – Merger – Santa Fe Pacific Et Al.*, 10 I.C.C.2d 661, 813 (1995). TP&W fails to explain why it cannot use either the trackage rights or the haulage rights to circumvent the TPR intermediate switch.

Third, the routing of traffic is a matter of managerial discretion. *Cf. Futurex Industries v. ICC*, 897 F.2d 866 (7th Cir. 1990); *People of State of Illinois v. ICC*, 698 F.2d 868, 873 (7th Cir. 1983); *Central Michigan Ry. Co. – Abandonment*, 7 I.C.C. 557 (1991); and *Southern Pacific Transp. Co. – Abandonment*, 360 I.C.C. 138 (1979). Consequently, TP&W cannot force BNSF into a direct interchange in East Peoria even if the BN Agreement had not been cancelled.

BNSF has informed TP&W that, for a number of reasons, it will **not** perform any operations pursuant to a cancelled BN Agreement. Furthermore, even if the BN Agreement had not been cancelled, it would be less efficient and less economical for BNSF and TP&W to perform pursuant to such BN Agreement for a variety of reasons. It seems TP&W will not take "no" for an answer. It also appears that cancelled agreements and contractual commitments have little meaning to TP&W.

The BN Agreement was cancelled and BNSF has a contractual commitment to file for discontinuance authority, a commitment which BNSF is seeking to honor. BNSF also has no

intention of instigating a protracted and expensive trackage rights compensation proceeding which, at the end of the day, may produce a trackage rights fee no different than the intermediate switch charge. Even if these hurdles could be overcome, there are operational issues which may make a direct interchange with TP&W impracticable and uneconomic for BNSF.

Finally, and most importantly, not a single shipper has come forward to complain. The true dispute at issue is one between TP&W and TPR.

CONCLUSION

The Board should treat the Reply for what it is: an attempt by TP&W to interject BNSF into a dispute between TP&W and TPR over who collects a larger share of the overall revenue pie. And as such, BNSF respectfully urges the Board to summarily deny the relief sought in the Reply and, instead, to grant the requested discontinuance.

Respectfully submitted,



Karl Morell
Of Counsel
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Kristy D. Clark
General Attorney
BNSF Railway Company
2500 Lou Menk Drive AOB-3
Fort Worth, Texas 76131

Attorneys for:
BNSF Railway Company

Dated: April 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2010, I have caused a copy of the forgoing
Response to be served on all parties of record by first class mail.



Karl Morell